HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

WRIT PETITION No.28150 OF 2017

ORDER:

Heard learned counsel for the petitioner.

The point involved in the present writ petition is with regard to maintainability of the writ petition in this Court for the relief sought for in the facts and circumstances of the case.

The petitioner entered into twenty contracts as stated below and filed the present writ petition by paying single Court fee of Rs.100/- on the writ petition challenging memo dated 11-7-2016 and sought inclusion of labour cess in the gross amount of the bill and deduction of the same from the said amount.

S.No.	Name of the work	Ag No.	Date
1	Aug-Mallapur in Karimnagar District Package-64	472/2013-14	15.02.2014
2	Aug-School of Excellence, Cintakunta, Elkathurthy in Karimnagar District Package-68	436/2013-14	31.01.2014
3	Aug-Nandhimadaram in Karimnagar District Package-65	437/2013-14	31.01.2014
4	Aug-Husnabad & Koheda in Karimnagar District Package-64	506/2013-14	03.03.2014
5	Rukmapur in Karimnagar District	1148/2014-15	19.11.2014
6	Chennur in Adilabad District	1142/2014-15	18.11.2014
7	Itikyal in MBNR District, Mankondur in Karimnagar District & Bellampally in Adilabad District under Package-IV	333/2013-14	18.12.2013
8	Aug-Mulugu in Medak District Package-92	441/2013-14	31.01.2014
9	Aug-Chitkul in Medak District Package-94	444/2013-14	31.01.2014
10	Aug-Mittapally in Medak District Package-91	442/2013-14	31.01.2014
11	Aug-Pochampad in Medak District Package-96	438/2013-14	31.01.2014

12	Aug-Uppalwai & Biknoor in Nizamabad District Package-101	440/2013-14	31.01.2014
13	Aug-Bhanswadi in Nizamabad District Package-99	485/2013-14	31.01.2014
14	Aug-Tadwai in Nizamabad District Package-102	439/2013-14	31.01.2014
15	Aug in Warangal District Package-73	503/2013-14	03.03.2014
16	Aug-Khammadanam, Lingal & Telkapally in Mahaboobnagar District Package-83	504/2013-14	03.03.2014
17	Aug-Alwal Mordoddi & Ramakkapet in Medak District Package-93	443/2013-14	31.01.2014
18	Kamalapur in Karimnagar District	160/2016-17	20.06.2016
19	Kulcharam in Medak District	509/2013-14	03.03.2014
20	Aug-Wyra, Nelakondapally, JC Khammam Package-78	417/2013-14	24.01.2014

As could be seen from the above table and enclosed copies of some agreements, the works are to be completed within 18 months from the date of signing agreement and thus, the periods of agreement came to an end. It appears that the second respondent issued a Memo on 11.07.2016 stating as follows:

> "Attention of the Superintending Engineer, APEWIDC, Hyderabad and all the Executive Engineers of Telangana State is invited to the subject cited. It is requested not to include the provision of 1% towards cess in the Estimates/Working estimates/Revised estimates and it is also requested not to operate the provision of 1% cess even it is approved in the Working/Revised estimates, if any communicated from the office of the undersigned."

The petitioner appears to have submitted a reply on 19.06.2017 stating that the Executive Engineer, while arranging payments, was deducting energy at 1% on the gross value of the work, without adding the same to the gross value of the work. It is the case of the petitioner that as per clause 102 (d) of the Conditions of Contract, it is required to add 1% of the gross amount in the Abstract Bill and deduct the same from each bill towards cess and to be remitted to the Construction Workers Welfare Board by the employer. Further Note(1) under Bill of Quantities says that the rates mentioned in the Bill of Quantities are including the overhead charges and contractors' profit, but excluding VAT and Labour Cess. The Labour Cess was mentioned as reimbursable item. Thus, the Labour Cess at 1% should be added to the gross amount of the bill and recover the same. The impugned Memo alters the said agreement conditions, more particularly, condition 102 (d) of Conditions of Contract and Bill of Quantities. The petitioner states that they are losing more than Rs.140 lakhs and sought withdrawal of the instructions.

The Agreement contains a clause for 'Adjudication of Disputes' and it reads as under:

ADJUDICATION OF DISPUTES

Except or otherwise provided in the contract, and disputes and differences arising out of or relating to the contract shall be referred to adjudication as follows.

1) i) Settlement of all claims upto Rs.50,000/- in value and below by way of Arbitration to be referred as follows:

a) Claims upto a value of Rs.10,000/- : Superintending Engineer of Social Welfare, Guntur.

b) Claims above Rs.10,000/- and upto Rs.50,000/- in value : Chief Engineer (R&B) Building, Hyderabad.

The Arbitration proceedings will be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act 1996 or any statutory notification thereof.

The Arbitrator shall invariably give reasons in the award.

ii) Settlement of all claims above Rs.50,000/- in value:- All claims above Rs.50,000/- in value shall be decided by the Civil Court of competent jurisdiction by way of a regular suit and not by Arbitration.

2) A reference for adjudication under this clause shall be made by either party to the contract within six months, from the date of intimating the contractor of the preparation of final bill or his having accepted payment.

The relevant clause dealing with 'Cess' as contained in clause 102(d) of the Conditions of Contract reads as follows:

> **d) Cess:**
>
> An amount equivalent to 1% of gross amount will be added in the Abstract bill and deducted from each bill of the Contractor towards cess and will be remitted to Andhra Pradesh. Building and other Cosntruction workers, Welfare Board as per G.O.Ms.No.57, LET&F (Lab.II) Department, dated 26/06/2007 and G.O.Ms.No.59, LET&F (Lab.II) Department, dated 29/06/2007. The same will be reimbursed to the Contractor as per Memo No.636/Reforms-A1/2008, dated 08.06.2011 of Irrigation & CAD (PW-REFORMS) Department, Government of Andhra Pradesh.

The above facts are not in dispute, but the only issue that is being considered in the present writ petition is with regard to maintainability of the writ petition.

There is no dispute that this is a contract executed by the Government with the petitioner in private capacity and each contract is separate. In the normal circumstances, when each contract is separate, the cause of action is also separate though may be identical and the petitioner has either to file separate writ petitions in respect of each contract or should pay court fee for all the contracts separately by filing a single writ petition. The writ petition is liable to be dismissed on this ground alone.

Coming to the main point with regard to the maintainability, though the contract was entered by the Government, it was entered with a private individual and the contract is in the nature of a private contact. Merely because the State is a party to the contract, it cannot be stated that the public law element is involved.

The learned counsel for the petitioner relied on **ABL International Limited v Export Credit Guarantee Corporation of**

India Limited[1], **Joshi Technologies International Inc., v Union of India**[2] and **Gujarat Maritime Board v Larsen &Toubro Infrastructure Development Projects Limited**[3] and submitted that the present Writ Petition is maintainable for the relief sought for herein.

This Court had an occasion to consider the maintainability of a writ petition in the matter of invocation of Bank Guarantee in W.P.No.24437 of 2017 and by order dated 07.08.2017, it was held as follows:

"The authoritative decision of the Supreme Court with regard to maintainability of a Writ Petition in a matter like this is Joshi Technologies International INC's case (supra). In the said case the facts set out in the judgment of the Hon'ble Supreme Court are as follows:

> "………….It so happened that the appellant had entered into two contracts dated 20.02.1995 with the Union of India, through Ministry of Petroleum and Natural Gas (MoPNG) in the year 1992 relating to exploration of certain oil fields which the Union of India had selected in Gujarat and other States. These contracts were on production sharing basis for Dholka and Wavel Oil Fields respectively. It started the production after entering into the contract and filed its income tax return on the income generated from the aforesaid production. In the returns, the appellant claimed benefit of Section 42 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Section 42 is a special provision for deductions in the case of business for prospecting, etc. for mineral oil. It provides for certain additional allowances as are specified in the agreement, details thereof would be taken note of hereinafter. We may, however, point out here itself that such allowances, as stipulated in the Section, are to be specifically mentioned in the agreement as well, which is entered into with the Central Government and it is also necessary that such an agreement has been laid on the Table of each House of Parliament.
>
> 2. The Income Tax Authorities extended the benefit of granting deductions under the aforesaid provisions from the year 2001-02 (assessment years onwards) when the appellant commenced commercial production in the aforesaid two oil fields. However, while making assessment for the Assessment Year 2005-06, the Assessing Officer observed that there were no such provisions made in the Agreements which were signed between the Central Government and the appellant and in the absence of such stipulation in the agreement, the appellant was not entitled to the

[1] (2004) 3 SCC 553
[2] (2015) 7 SCC 728
[3] (2016) 10 SCC 46

benefit of deductions under Section 42 of the Act. Realising that the Agreements did not contain such a provision, the appellant wrote to the MoPNG stating that though there was such an arrangement agreed to as per the understanding between the two parties, non-inclusion thereof was an inadvertent omission in the Contracts that were signed. The MoPNG wrote to Ministry of Finance (MoF) accepting the aforesaid omissions and requested the MoF to give clarification in this behalf. As no clarification came from the MoF, the Assessing Officer disallowed the claim for deduction under Section 42(1)(b) and 42(1)(c) of the Act.

3. At this stage, the appellant preferred writ petition………."

The Writ Petition was dismissed by the High Court on 28.05.2012 and challenging which the above appeal was filed. The Hon'ble Supreme Court framed five issues and while answering Issue Nos.4 and 5 the Hon'ble Supreme Court considered the following three facets included in the said questions.

"49. These issues have three facets, namely:

(i) Whether there is a prayer to this effect in the Writ Petition?
(ii) If it was intended to give such a benefit before entering into the agreement, whether this intention gives any right to the appellant to seek an amendment?
(iii) Whether the Court has the power to issue mandamus or direction to the Government?"

While holding that without there being a prayer in view of availability of specific averments in the body of the writ petition as well as in the grounds, the plea was entertained, though reluctantly. With regard to Court's power to issue Mandamus or direction, the observations of the Court are as follows:

"55. Law in this aspect has developed through catena of judgments of this Court and from the reading of these judgments it would follow that in pure contractual matters extraordinary remedy of Writ under Article 226 or Article 32 of the Constitution cannot be invoked. However, in a limited sphere such remedies are available only when the non-Government contracting party is able to demonstrate that its a public law remedy which such party seeks to invoke, in contradistinction to the private law remedy simplicitor under the contract. Some of the case law to bring home this cardinal principle is taken note of hereinafter.

56. Significantly, in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. v. R. Rudani ((1989) 2 SCC 691) as well, this Court made it clear that if the rights are purely of private character, no mandamus can be issued. Thus, even if the respondent is a 'State', the other condition which has to be satisfied for issuance of a Writ of Mandamus is the public duty. In a matter of private character or purely contractual field, no such public duty element is involved and, thus, Mandamus will not lie.

57. First case which needs to be referred is Bareilly Development Authority Vs. Ajai Pal Singh and others [1989] 1 SCR 743). That was the case where Appellate Authority had undertaken construction of dwelling units for people belonging to different

income groups and the cost at which such flats were to be allotted to the allottees. However, it was mentioned that the cost stated was only estimated cost and subject to increase or decrease according to rise or fall in the price at the time of completion of property. The authority increased the cost and monthly installment rates which it demanded from the allottees were almost doubled and cost and rates of installments initially stated in the brochure. Respondents/allottees filed writ petition challenging the same and in this context question of maintainability of the writ petition arose. High Court, relying upon the judgment of the Supreme Court in the case of Ramana Dayaram Shetty Vs. Airport Authority of India (1979) II LLJ 217 SC) allowed the writ petition by observing as under : (Ajai Pal Singh v. Bareilly Development Authority, 1986 SCC OnLine All 110 : AIR 1986 All 362, para 16)

> "16……It has not been disputed that the contesting opposite party is included within the term `other authority' mentioned under Article 12 of the constitution. Therefore, the contesting opposite parties cannot be permitted to act arbitrarily with the principle which meets the test of reason and relevance. Where an authority appears acting unreasonably, this court is not powerless and a writ of mandamus can be issued for performing its duty free from arbitrariness or unreasonableness."

58. In appeal filed by the Authority, this Court in Ajai Pal Singh case (supra), on facts, noted that the respondents had applied for registration only by acceptance of terms and conditions contained in the brochure. Moreover, subsequently letter was written by the Authority about the enhancement of the cost of the houses/flats as well as increase in monthly installments. Rate of yearly interest requesting allottees to give their written acceptance and the respondents except respondent No.4 had sent their written acceptance and it was on the basis of the written acceptance that name of first respondent was included in the draw and he was successful in getting allotment of a particular house. The court observed that respondents were under no obligation to seek allotment of house/ flats even if they had registered themselves. Notwithstanding, they voluntarily registered themselves as applicants only after fully understanding the terms and conditions of the brochure including relating to variance in prices.

59. On the basis of these facts, this Court observed that the aforesaid observations of the High Court relying upon Ramana Dayaram Shetty case (supra) were not correct. Thus observed the Court, speaking through Ratnavel Pandian. J.: (Bareilly Development Authority v. Ajai Pal Singh, (1989) 2 SCC 116 : (1989) 1 SCR 743, SCC pp. 125-26, paras 21-22)

> "21. This finding in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty case (supra), there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a state or would be comprehended in 'other authority' for the purpose of Article 12 of the constitution, while determining price of the houses/flats constructed by it and the rate of monthly installments to be paid, the Authority or its agent after entering into the field of ordinary contract acts purely in its executive capacity.

Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field.

22. There is a line of decisions where the contract entered into between the state and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple - Radhakrishna Agarwal Vs. State of Bihar (1977) 3 SCC 457), Premji Bhai Parmar Vs. Delhi Development Authority (1980 (2) SCC 129) and DFO Vs. Biswanath Tea Company Ltd. (1981) 3 SCC 238)"

60. The next case of relevance is the Divisional Forest officer Vs. Bishwanath Tea Co. Ltd. (supra). In that case respondents took on lease certain land from the Government. Initially, period of lease was 15 years. The lease was to be extended for cultivation and raising tea garden and was subject to condition set out in the Lease Agreement and generally to Assam Land & Revenue Regulation and Rules made thereunder. The Respondent Company approached appellant seeking permission to cut 7000 cubic ft of timber. The Appellant took the stand that as the timber was required for a particular use which was not within the Grant, full royalty will be payable on timber so cut and removed. The Respondent company paid the amount of royalty under protest and filed writ petition under Article 226 of the Constitution in the High Court alleging that upon a true construction of the relevant clauses of the Grant as also the proviso to Rule 37 of the Settlement Rules, it was entitled to cut and remove timber without payment of royalty and, therefore, the recovery of royalty being unsupported by law, the appellant was liable to refund the same.

61. A preliminary objection was taken by the appellant to the maintainability of the writ petition on the ground that claim of the respondent flows from terms of lease and such contractual rights and obligations can only be enforced in a civil court. This preliminary objection was overruled by the Court which proceeded to hear the matter and allowed the writ petition of the respondent company. In appeal by the appellant to this Court, the decision of the High Court was reversed holding that writ was not maintainable. The following observations may usefully be quoted: (Bishwanath Tea Co.Ltd. case (supra), SCC p.246, paras 8-9)

"8. It is undoubtedly true that High Court can entertain in its extraordinary jurisdiction a petition to issue any of the prerogative writs for any other purpose. But such writ can be issued where there is executive action unsupported by law or even in respect of corporation there is a denial of equality before law or equal protection of law. The Corporation can also file a writ petition for enforcement of a right under a statute. As pointed out earlier, the respondent company was merely trying to enforce a contractual obligation. To clear the ground let it be stated that obligation to pay royalty for timber cut and felled and removed is prescribed by the relevant regulations, the validity of regulations is not challenged. Therefore, the demand for royalty is unsupported by law. What the respondent claims is an exception that in view of a certain term in the indenture of lease, to writ, Clause 2, the appellant is not entitled to demand and collect royalty from the respondent. This is nothing but enforcement of a term of a contract of lease. Hence, the question whether such contractual obligation can be enforced by the High Court in its writ jurisdiction.

9. Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the Civil Court. The High Court in its extraordinary jurisdiction would entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a Civil Court where a suit for specific performance of contract or for damages could be filed.....”

Thereafter, the Court considered Shrilekha Vidyarthi v. State of UP[4] and the observations made therein elaborately. The further observations of the Court are as follows.

“65. Similarly, in State of Gujarat v. M.P. Shah Charitable Trust [1994) 3 SCC 552), this Court reiterated the principles that if the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, for example, where the matter is governed by a non-statutory contract.

66. At this stage, we would like to discuss at length the judgment of this Court in ABL International Ltd. V Export Credit Guarantee Corpn. of India Ltd (2004) 3 SCC 553), on which strong reliance is placed by the counsel for both the parties. In that case, various earlier judgments right from the year 1954 were taken note of. One such judgment which the Department in support of their case had referred to was the decision of Apex Court in case LIC of India v. Escorts Ltd.[1986) 1 SCC 264] wherein the Court had held that ordinarily in matter relating to contractual obligations, the Court would not examine it unless the action has some public law character attached to it. The following passage from the said judgment was relied upon by the respondents: (ABL International Ltd. case (supra), SCC pp. 565-66, para 12)

"12. ‘102………If the action of the State is related to contractual obligations or obligations arising out of the tort, *the court may not ordinarily examine it unless the action has some public law character attached to it*. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law

[4] (1991) 1 SCC 212 : 1991 SCC (L&S) 742

field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder." (Escorts Ltd. case (supra), SCC p.344, para 102)”

(emphasis in original)

This Court dealt with this judgment in the following manner: (SCC p.566, para 13)

"13. We do not think this Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in LIC v. Escorts Ltd., (supra) proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the court's jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words "court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates that in a given case, on the existence of the required factual matrix a remedy under Article 226 of the Constitution will be available."

67. Insofar as the argument of the respondents in the said case that writ petition on contractual matter was not maintainable unless it is shown that the authority performs a public function or discharges a public duty, is concerned, it was answered in the following manner: (ABL International Ltd. case (supra), SCC pp. 569-70, paras 22-23)

"22. We do not think the above judgment in VST Industries Ltd. V. Workers Union (2001) 1 SCC 298) supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that VST Industries Ltd., against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the statute concerned to perform certain public functions, failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: was first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract ? Answer to this question, in our opinion, is found in the judgment of this Court in the case of Shri Lekha Vidyarthi v. State of U.P. [1991 (1) SCC 212] wherein this Court held: (SCC pp. 236-37, paras 22& 24)

"22. ………The impact of every State action is also on public interest.

*   *   *

24……….It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters."

23. It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14 then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent."

68. The Court thereafter summarized the legal position in the following manner: (ABL International Ltd., case (supra), SCC pp. 572, paras 27-28)

"27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having

> regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. [1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction."

69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarized as under:

70.1 At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2 State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

70.3 Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article

226 of the Constitution. In such cases the court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

70.4 Writ jurisdiction of High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5 Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. The Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

71. Keeping in mind the aforesaid principles and after considering the arguments of respective parties, we are of the view that on the facts of the present case, it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the Constitution. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded."

The appeal was ultimately dismissed confirming the order of the High Court. The above elaborate extracts from the judgment of the Hon'ble Supreme Court are made only in order to avoid repetition of the facts considered in various cases and to put the law in proper perspective.

The observations made therein and law laid down were considered in Gujarat Maritime Board's case (supra) and approved the ratio laid down in the above decision. The brief facts in Gujarat Maritime Board's case are; the appellant invited bids for development of Sutrapada Port and a letter of intent was issued to the first respondent. As per the letter of intent a performance guarantee/bank guarantee of Rs.5.00 Crores was required to be submitted to Gujarat Maritime Board. The first respondent requested for change of location from Sutrapadu to Kachchigarh and the bank guarantee was extended. The Yes Bank Limited furnished a bank guarantee to the appellant on 26.11.2011 for the amount of Rs.5.00 Crores. The first respondent could not proceed with the work even at the new place and the appellant by letter dated 10.03.2015 cancelled the letter of intent issued to the first respondent and on the same day invoked the bank guarantee furnished by Yes Bank Limited at the instance of the first respondent. Challenging the cancellation of letter of intent and invocation of bank guarantee the first respondent filed a writ petition before the High Court of Gujarat and the writ petition was allowed. In the back drop of the said facts of the case, the Hon'ble Supreme Court observed as follows:

"9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit "… if the contract had frustrated on account of impossibility…" but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor-bank and the guarantee-appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter, viz., the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved."

Thereafter, it approved the ratio laid down in Joshi Technologies International INC's case (supra) and made the following observations.

> "11. It is contended on behalf of the first respondent that the invocation of Bank Guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of Bank Guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contact and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.
>
> 12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Limited v. Coal Tar Refining Company [2007) 8 SCC 110], at paragraph -14: (SCC pp. 117-18)
>
> > "14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:
> >
> > (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
> >
> > (ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.
> >
> > (iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.
> >
> > (iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

> (v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.
>
> (vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

> 13. The guarantee given by the bank to the appellant contains only the condition that in case of breach by the lead promoter, viz., the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the bank should honour it ... "without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the bank that such written demand from the appellant on the bank shall be ... "conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 06.02.2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc., are not within the purview of an inquiry under Article 226 of the Constitution of India. <u>Between the bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee.</u>"
>
> (Underlining and emphasis is mine)

What emerges from the above discussion is that though the respondent is a State within the meaning of Article 12 of the Constitution of India, in the absence of any element of public law, the Writ Petition in a contractual matter is not maintainable. In respect of bank guarantees, the satisfaction of the beneficiary is final with regard to breach of the covenants between the beneficiary and the person on whose behalf the bank guarantee was issued and the bank has no other alternative except to honour the payment under the guarantee.

In the case before me, though the respondents satisfy the requirement of State, no relief can be granted in the present Writ Petition in the absence of any element of public law. The contract between the petitioners and the respondents are purely private contracts. The first point is answered accordingly."

A Full Bench of this Court in **Yanala Malleshwari vs. Smt. Ananthula Sayamma**[5], examined the distinction between the private law and the public law and held that though the Registering Authorities are statutory authorities, their functions may or may not strictly come within the public law. Thereafter, it examined the power of judicial review of this Court and observed as follows:

> "85. Judicial Review has its own limitations and all decisions of public bodies are not amenable to this public law power. Nor is it permissible for a reviewing Court to deal with matters which lack adjudicative disposition by reason of prerogative nature of the power exercised by the public authority or exclusive entrustment of powers to a specialised body of the State. As the legislative and executive wings are prohibited from usurping the judicial functions of the State, the judiciary is not expected to discharge legislative and executive functions. The exposition of the principles of judicial review by Lord Diplock in **Council of Civil Service Unions v. Minister for the Civil Service, ((1985) AC 374)**, has attained the classical status of law of judicial review. While grouping the grounds of judicial review into three broad points, namely, illegality, irrationality and impropriety, the noble Lord observed:
>
> > For a decision to be susceptible to judicial review the decision- maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always now-a-days a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of 'the prerogative'.
>
> 86. In a recent Judgment in **State of U.P. v. Johri Mal, ((2004) 4 SCC 714: 2014 AIR SCW 3888 (para 28)),** the Supreme Court of India reiterated the scope and limitations of judicial review in the following terms:
>
> > 28. The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi-judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of the omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for

---

[5] AIR 2007 AP 57

consideration before a judicial review court. The limited scope of judicial review, succinctly put, is:
(*i*) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.
(*ii*) A petition for a judicial review would lie only on certain well-defined grounds.
(*iii*) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.
(*iv*) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a court is limited to seeing that the Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.
(*v*) The courts cannot be called upon to undertake the government duties and functions. The court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a judge should not be invoked as a substitute for the judgment of the legislative bodies. **(See *Ira Munn* v. *State of Illinois* [94 US 113 : 24 L Ed 77 (1876)]).**

87. Apart from the limitations pointed out by the Supreme Court, the power of judicial review is not available when there is an effective alternative remedy to the aggrieved person. When granting redressal involves adjudication of disputed questions of facts, which require adducing of evidence by the parties, then also ordinarily an application for a judicial review is not accepted. See **Whirlpool Corporation v. Registrar of Trade Marks, (AIR 1999 SC 2).** There is justification for the principle. Clive Lewis in Judicial Remedies in Public Law (first edition 1992, Sweet and Maxwell, pp.229 and 230), explained the rationale for the principle as under.

The rationale for the exhaustion of remedies principle is relevant to the scope of that principle. A twofold justification has been put forward. First, that where Parliament has provided for a statutory appeals procedure, it is not for the Courts to usurp the functions of the appellate body. The principle applies equally to bodies not created by statute which have their own appellate system. Secondly, the public interest dictates that judicial review should be exercised speedily, and to that end it is necessary to limit the number of cases in which judicial review is used. To these reasons can be added the additional expertise that the appellate bodies possess. In tax cases, for example, the appellate body, the General or Special Commissioners, have wide experience of the complex and detailed tax legislation. In employment cases, for example, the system of Industrial and Employment Appeal Tribunals may be better equipped to deal with industrial issues than the High Court."

What emerges from the above discussion is as follows:

i. The contracts entered by the respondents with the petitioner do not come under the realm of public law and are governed by the conditions of contract.

ii. The discretionary jurisdiction under Article 226 of the Constitution of India should not be exercised when the matter is in the realm of pure contract as distinguished from a statutory contract.

iii. If there is a breach of a contract, the party complaining of such breach may sue for specific performance of the contract, if the contract is capable of being specifically performed, or the party may sue for damages.

iv. It is not as if the petitioner is not without remedy as a dispute resolution mechanism is provided in the Conditions of Contract itself and the petitioner cannot be said to be damaged irretrivably.

In view of the above settled principles of **Joshi Technologies International INC's** case, following the **ABL International Limited**'s case and upheld in **Gujarat Maritime Board**'s case, it is prudent for this Court not to entertain purely contractual matters in exercise of discretionary jurisdiction of this Court under Article 226 of the Constitution of India. This would avoid much of the avoidable litigation thereby unburdening the docket of this Court. Keeping in view the present pendency of cases and availability of alternative remedy to the petitioner, I am not inclined to entertain the present writ petition.

The writ petition is accordingly dismissed at the admission stage itself. Consequently, miscellaneous petitions, if any pending, in the writ petition shall stand closed.

A.RAMALINGESWARA RAO, J

29.08.2017
pln